

ORIGINAL

BEFORE THE

Federal Communications Commission NOV - 9 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ET Docket No. 92-28

RM-7771 PP-29 ~~PP-72~~

RM-7773 PP-30

RM-7805 PP-31

RM-7806

NOV 06 1992

MAIL BRANCH

**CELSAT OPPOSITION TO
TRN MOTION TO DISMISS**

From TRW, Inc., the same party which only recently pleaded with Dr. Thomas P. Stanley that

"ENOUGH IS ENOUGH! The Commission's resources are too scarce and the time of its employees too valuable for any more effort to be expended on continuous, irrelevant filings which play more to public relations than considered decision-making",¹

the Commission now has yet another frivolous pleading to deal with. TRW has moved to dismiss CELSAT's Petition for Reconsideration of that portion of the Commission's September 4, 1992 Notice of Proposed Rule Making and Tentative Decision ("NPRMTD") which unequivocally dismissed CELSAT's petition for rule changes to

¹ See, letter from Norman P. Leventhal, attorney for TRW, Inc., to Thomas P. Stanley dated June 16, 1992, filed in Et Docket No. 92-28.

No. of Copies rec'd.
List A B C D E

permit the RDSS L/S-Band to be used for both conventional Mobile Satellite Service and incidental portions thereof for simultaneous ground cellular communications in a *hybrid* mode.² The basis for TRW's motion are its contentions that (1) petitions for reconsideration of interlocutory actions in rulemaking proceedings are not permitted as non-final actions; and (2) the Commission's deferral of consideration of other aspects of CELSAT's petition renders the action non-final.

With respect to the former, contrary to TRW's contention the Commission's action insofar as it dismissed CELSAT's petition relative to its proposals for the RDSS L/S-Band constituted a final and reviewable action notwithstanding that the FCC elected to announce that action in a notice of proposed rulemaking. In fact the "finality" of the Commission's action insofar as it affected CELSAT's potential rights to participate in the RDSS L/S-Band cannot be better manifested than it has been by the arguments raised by TRW, as well as the other participant/applicants in this proceeding, to the effect that CELSAT should not be permitted to participate in the negotiated rulemaking proceedings in CC Docket No. 92-166 because CELSAT's petition has been "dismissed" and

² In its Petition for Reconsideration CELSAT pointed out, among other concerns, that, in view of the desired sharing of this band and limits on the potential available bandwidth due to the co-primary status extended to the GLONASS system at WARC-92, its HPCN could operate just as well in with full hybrid capability by using the RDSS L/S-Band only in a shared MSS/RDSS mode as the Commission is now proposing for this band, while turning to other spectrum in the 2 GHz band for the hybrid ground component.

"denied".³ Clearly, there has been no question in these parties' minds as expressed in that docket (including TRW) as to the finality of the Commission's decision with respect to CELSAT.

The term "final order" has been construed by the courts to mean "an order [which] impose[s] an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." Reuters. Ltd. v. FCC, 781 F.2d 946, 947 n.1 (D.C. Cir. 1986), quoting Bethesda-Chevy Chase Broadcasters, Inc. v. FCC, 385 F.2d 967, 968 (D.C. Cir. 1967). Clearly, unless CELSAT's petition for reconsideration is granted, the effect of the Commission NPRMTD will be to deny CELSAT any right of access both to the former RDSS L/S-Band as well as to any negotiated rulemaking process which serves to shape the technical rules affecting that band in the future.

Fortunately for CELSAT, it is not absolute that all notices of proposed rulemakings are non-final actions; indeed, the Commission can and has taken reviewable final actions even in such NPRM proceedings which ordinarily purport to be the mere start of the administrative rulemaking process. This was the case, for example, in the Commission's recent attempt to establish billing and collection service rules wherein it dismissed that aspect of petitioner's rulemaking proposal which would have required the LECs

³ See, e.g., CC Docket No. 92-166, TRW's Comments, p. 5; and Reply Comments of: Constellation Communications, Inc., p. 4; Motorola Satellite Communications, Inc., p. 9; Loral Qualcomm Satellite Services, Inc., p. 2.

to provide billing and collection services.⁴ In denying a motion to dismiss a petition for review, the court concluded that the Commission's NPRM denying petitioner's request for a declaratory ruling or, in the alternative, for a rule making "is final" and constituted "'a terminal, complete resolution' of this issue, and the agency's action had legal consequence", citing *Intercity Transportation Co. v. United States*, 737 F.2d 103, 106-07 (D.C. Cir. 1984). *Capital Network System, Inc. v. F.C.C.*, Case No. 91-1280, (D.C. Cir. 1992), *per curiam* slip opinion attached. Had CELSAT sought court review of the narrow dismissal issue instead of reconsideration it would have not only delayed and impeded progress in this proceeding, but CELSAT clearly would have prevailed. CELSAT can expect the same favorable outcome on review should the Commission dismiss its petition in response to TRW's motion. It hardly appears to serve either TRW's or any other parties' interest in this docket to aggravate an issue already immediately ripe for review. Thus, the motion should be denied.

As for TRW's second contention, that the Commission's action is not "final" because it has deferred consideration of CELSAT's alternative spectrum choice to another time and another proceeding, CELSAT submits that it is not presently seeking reconsideration of that aspect of the Commission's decision in this docket. Thus, the fact that the Commission has indicated an

⁴ *Policy and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Notice of Proposed Rule Making*, CC Docket No. 91-115, 6 FCC Rcd 3506 (1991).

intention to pursue other aspects of CELSAT's petition for rule making in another proceeding (RM-7927) is no barrier to CELSAT pursuing here, or on court review, those aspects which the Commission intended to be and apparently the other party/applicants agree has been unequivocally denied with finality.

Finally, it should not go unnoticed that no party opposed CELSAT's Petition for Reconsideration on the merits. It can only be speculated that there are two reasons for this. The first has to do with the fact that CELSAT's position on reconsideration is unassailable -- the CELSAT proposal is nearly infinitely flexible and far more capable of sharing spectrum with either Motorola's IRIDIUM or the LEO systems of the Gang-of-Four than any other MSS system proposal.

The second concerns the silent, albeit conspicuous ongoing collusion between Motorola and the Gang-of-Four toward CELSAT publicly and CELSAT's efforts before the Commission. Thus far in the pleadings this has been manifested in (i) the orchestrated consistency with which each applicant/party has either joined in chorus to oppose on narrow procedural grounds only CELSAT's participation in this docket and in CC Docket 92-166,⁵ and (ii) as with the petition for reconsideration, the consistent

⁵ The applicants contend in perfect harmony that CELSAT missed the June 3, 1991 RDSS cut-off date and therefore is precluded from any consideration in the original RDSS band. CELSAT has just as consistently made clear that it has no objection to not being included among the first cutoff group, but that because the band is to be shared, and because CELSAT has demonstrated how it can be effectively shared, CELSAT may be content with being considered under a separate, later cutoff, particularly if it is granted a pioneers preference as it has requested.

degree to which the parties have remained totally silent on the merits of any aspect of CELSAT's proposal. Another manifestation is reflected in the degree to which Motorola has sought to limit access under its alternative spectrum proposal for the L-Band uplink (originally a CELSAT concept) to only the existing Gang-of-Four applicants and to the exclusion of CELSAT.⁶ Yet another concerns Loral/Qualcomm's express statement to the Commission that it will not license its CDMA technology to CELSAT.⁷ And at a recent meeting of the Society of Satellite Professions, the spokesman/panelist for Loral/Qualcomm publicly berated CELSAT as having no more substance "than a few view graphs" as his basis for omitting any mention of CELSAT from an overview presentation to the Society on the status of the RDSS proceedings.

Possibly even more serious, however, is the collusion believed to be going on behind the scenes, ostensibly in preparation for the negotiated rulemaking proceeding. It has been reported in the most recent issue of Mobile Satellite News, for example, that the Gang-of-Four has been meeting to coordinate their CDMA spectrum plan, again without an invitation or notice to CELSAT. That CELSAT has a contribution to make in this regard, as well as an interest in its outcome, cannot be denied considering

⁶ See, e.g., Motorola Petition for Rulemaking, filed September 22, 1992, and its Petition for Expedited Action, filed on June 9, 1992.

⁷ See, CELSAT Consolidated Reply, pp. 23-27.

that CELSAT is the only party which has both indicated an ability to share the spectrum with any one or all of the Gang-of-Four on a CDMA spread spectrum basis, and is the only party which has demonstrated how this might be accomplished and with what effects in its submissions to the Commission. At the very least, CELSAT foresees another LEOSAT "shunning" at the next negotiations; at worst, it sees an illegal anticompetitive abuse of the Commission's newly created industry negotiation process which could serve to be its undoing.

Accordingly, the foregoing reasons considered, CELSAT urges the Commission to deny TRW Inc.'s Motion to Dismiss.

Respectfully submitted,
CELSAT, INC.

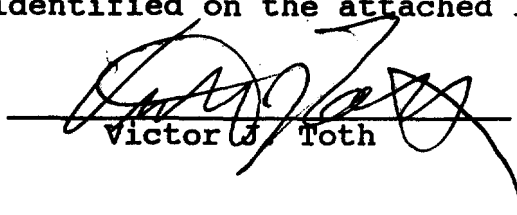
By: 
Victor J. Toth

Victor J. Toth
Law Offices, Victor Toth, P.C.
2719 Soapstone Drive
Reston, VA 22091
(703) 476-5515

November 5, 1992

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Opposition to Motion has been served this date on Norman P. Leventhal, Esq., at Leventhal, Senter & Lerman, 2000 K Street, N.W., Suite 600, Washington, D.C. 20006, counsel for TRW, Inc., as well as on the other parties identified on the attached list.


Victor J. Toth

November 5, 1992

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ATTACHMENT

No. 91-1280

September Term, 19 91

Capital Network System, Inc.,

Petitioner

United States Court of Appeals
For the District of Columbia Circuit

v.

FILED MAR 19 1992

Federal Communications Commission
and United States of America,

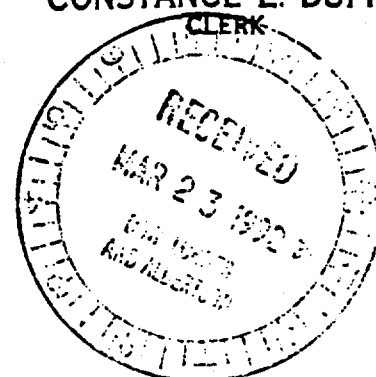
CONSTANCE L. DUPRÉ

Respondents

U S West Communications, Inc., et al.,

Intervenors

And consolidated case No. 91-1291



BEFORE: Mikva, Chief Judge; Buckley, Circuit Judge

O R D E R

Upon consideration of the motion to dismiss, the oppositions thereto, and the reply, it is

ORDERED that the motion to dismiss be denied. We have jurisdiction to review only "final orders" of the Federal Communications Commission. See 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a). The Commission's notice of proposed rulemaking released May 24, 1991 is final to the extent that the agency denied petitioner's request for a declaratory judgment or, in the alternative, for rulemaking requiring local exchange carriers to provide billing and collection services. The Commission made "a terminal, complete resolution" of this issue, and the agency's action had legal consequence. See Intercity Transportation Co. v. United States, 737 F.2d 103, 106-07 (D.C. Cir. 1984). Because petitioners seek review only of the Commission's determination with respect to billing and collection services and because this aspect of the notice of proposed rulemaking is final, we deny the motion to dismiss.

Per Curiam

CERTIFICATE OF SERVICE

Leslie Taylor, Esq.
Leslie Taylor Associates
6800 Carlynn Court
Bethesda, MD 20817-4302
(Counsel for Loral)

Veronica Haggart, Esq.
Robert Frieden, Esq.
Motorola, Inc.
1350 I Street, N.W.
Suite 400
Washington, D.C. 20005

Philip L. Malet, Esq.
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(Counsel for Motorola)

Dr. Robert L. Riemer
Committee on Radio Frequencies P
HA-562
National Research Council
2101 Constitution Avenue, N.W.
Washington, D.C. 20418

Daniel L. Bart, Esq.
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(Counsel for GTE Service Corporation)

Richard McKenna, Esq.
HQE03J36
GTE Service Corporation
P.O. Box 152092
Irving, TX 75015-2092
(Counsel for GTE Service Corporation)

Dr. Frank Press
President
National Academy of Sciences'
Committee on Radio Frequencies
2101 Constitution Avenue, N.W.
Washington, D.C. 20418

Christopher D. Imlay, Esq.
Booth, Frefret & Imlay
1920 N Street, N.W.
Suite 150
Washington, D.C. 20036

*Thomas Tycz
Deputy Chief, Domestic Facilities Division
Common Carrier Bureau
Federal Communications Commission
Room 6010
2025 M Street, N.W.
Washington, D.C. 20554

*Fern J. Jarmulnek
Satellite Radio Branch
Federal Communications Commission
2025 M Street, N.W.
Room 6324
Washington, D.C. 20554

Lon C. Levin, Esq.
Vice President & Regulatory Counsel
American Mobile Satellite Corporation
1150 Connecticut Avenue, N.W.
4th Floor
Washington, D.C. 20036

Bruce D. Jacobs, Esq.
Glenn S. Richards, Esq.
Fisher, Wayland, Cooper & Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037
(Counsel for AMSC)

Robert A. Mazer, Esq.
Albert Shuldiner, Esq.
Nixon, Hargrave, Devans & Doyle
One Thomas Circle, N.W.
Suite 800
Washington, D.C. 20005
(Counsel for Constellation)

Jill Abeshouse Stern, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037
(Counsel for Ellipsat)

Linda K. Smith, Esq.
Robert M. Halperin, Esq.
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(Counsel for Loral)

Mr. Richard G. Gould
Telecommunications Systems
Suite 600
1629 K Street, N.W.
Washington, D.C. 20006

*Cheryl A. Tritt
Chief, Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, D.C. 20554

*Renee Licht
Acting General Counsel
Federal Communications Commission
Room 614
1919 M Street, N.W.
Washington, D.C. 20554

*William Torak
Deputy Chief, Spectrum Engineering Division
Federal Communications Commission
Room 7130
2025 M Street, N.W.
Washington, D.C. 20554

*Raymond LaForge
Federal Communications Commission
Room 7334
2025 M Street, N.W.
Washington, D.C. 20554

*Wendell R. Harris
Assistant Bureau Chief
Common Carrier Bureau
Federal Communications Commission
Room 7130
2025 M Street, N.W.
Washington, D.C. 20554

*Cecily C. Holiday
Chief, Satellite Radio Branch
Federal Communications Commission
Room 6324
2025 M Street, N.W.
Washington, D.C. 20554

*James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau
Federal Communications Commission
Room 6010
2025 M Street, N.W.
Washington, D.C. 20554